

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

**ANTLER CONSTRUCTION, INC.,
a Michigan corporation,**

Plaintiff,

-v-

MCNISH GROUP, INC.,

Defendant.

Case No. 14-014075-CK

Hon. Daniel P. Ryan

14-014075-CK

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CATHY M. GARRETT
/s/ Michelle Howard

OPINION

This civil matter is before the Court on a motion for summary disposition pursuant to MCR 2.116(C)(10) filed by Defendant, McNish Group, Inc. For the reasons stated below, the Court will grant in part and deny in part the motion

I. FACTUAL AND PROCEDURAL HISTORY

The instant motion arises out of the first amended complaint filed by Plaintiff, Antler Construction, Inc., against Defendant. The complaint is the result of a defective bid bond that Defendant provided when Plaintiff submitted a competitive bid for the construction of the Washtenaw Armory, a state owned construction project. The provision of a surety bond is a requirement under MCL 129.201 before a public construction project is awarded to a contractor. Defendant provided a defective, nonconforming bond by obtaining the bond from an unapproved surety, U S I & C, which disqualified Plaintiff from the bidding process even though Plaintiff had been the low bidder on the project.

Plaintiff's complaint alleges that Defendant breached its contract to provide a conforming bond which would be procured from a surety listed on the U.S. Department of Treasury Circular

570, that Defendant was negligent and breached its duty to Plaintiff, and that Plaintiff detrimentally relied on Defendant's promise to provide an adequate bond for Plaintiff's competitive bid. The instant motion followed.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The trial court must also consider all relevant evidence that is submitted to determine whether there is factual support for the claim. MCR 2.116(G)(5); *Sisson v Bd of Regents of the Univ of Michigan*, 174 Mich App 742, 745; 436 NW2d 747 (1989). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

1. Breach of Contract

In support of its motion, Defendant first asserts that a breach of contract claim against an insurance provider for negligent provision of an insurance project is not recognized under Michigan law.

Generally, “there are five elements of a valid contract: ‘(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.’ *Hess v Cannon Twp.*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (quotation marks and citation omitted). Most of the elements listed above reflect the fact that the parties to a contract must have ‘a meeting of the minds on all essential terms of a contract.’ *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004).” *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 13; 824 NW2d 202 (2012).

Under Michigan law, the relationship between an insured and an insurer is a contractual one. *Harts v Farmers Ins Exchange*, 461 Mich 1, 597 NW2d 47 (1999).

Defendant contends that the provision of a nonconforming bond is the result of negligent advice of the agent securing the surety bond. It further states that, despite the contractual relationship between insurer and insured, a breach of contract action grounded in negligence is not a cognizable claim. In support of its argument, it cites *Stephens v Worden Insurance Agency*, 307 Mich App 220; 859 NW2d 723 (2014). The *Worden* case concerned the applicable statute of limitations and stated:

...this Court has characterized an insurance agent's failure to procure requested insurance as a tort. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324–325, 661 NW2d 248 (2003). See also *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 37–38, 761 NW2d 151 (2008) (holding that an insurance agent who does not procure the insurance coverage requested breaches his or her duty, suggesting a negligence claim).

[Emphasis added].
Id at 229.

Thus, under the *Worden* case, failure to procure insurance as requested by the purchaser is a tort claim rather than a contract claim. Plaintiff asserts that it requested a proper bond and not a nonconforming bond and that Defendant promised to deliver an acceptable bond.

In contrast, Defendant states that Plaintiff knew that it was providing a bond from a surety which was not on the state approved list. Plaintiff argues that Defendant assured Plaintiff that it would provide a bond for it. Additionally, although Defendant knew that the surety was not on the approved list, Defendant stated that the surety had been acceptable on past projects.

In the Court's view, the exchange of emails between the parties indicates that Defendant and Plaintiff had a contractual relationship and that they had exchanged promises. Plaintiff promised to purchase from Defendant a bidding bond and Defendant promised to provide the bond.

The bond is submitted on standard form 0300 which accompanies the contractor's bid when it is submitted to the state. The form itself indicates that the bond must be provided by a surety that is on the list of sureties in U.S. Department of Treasury Circular 570. Having provided surety bonds numerous times before, Defendant was aware of the necessity of using a surety on the Circular 570 list. It knew that U S I & C, the surety, was not on the list, but nevertheless obtained the bond from U S I & C, whereupon Plaintiff's bid was rejected.

Though Defendant may have breached its promise to provide a proper bond to satisfy Michigan's bidding requirements, so too Defendant has provided sufficient evidence that Plaintiff knew that the surety was unapproved, yet proceeded with the bond. Plaintiff, on the other hand, provides sufficient evidence that Defendant assured it that the surety had been

utilized in the past several times and had been accepted by the state. Notwithstanding the breach of promise, as Defendant correctly states, Defendant's failure to provide sufficient coverage as requested by Plaintiff sounds in tort and is not a breach of contract. *Id.*

Therefore, the Court will grant summary disposition as to Plaintiff's breach of contract claim.

2. Negligence

Defendant next argues that Plaintiff's negligence claim should be dismissed because, under *Harts, supra*, Defendant owes no duty to Plaintiff "to advise a potential insured about any coverage." *Id* at 10. It claims its only duty was to provide Plaintiff with the best bond under the circumstances.

To advance a claim of negligence, a plaintiff must prove the elements of a negligence cause of action: (1) that defendant had a duty to plaintiff; (2) the defendant breached that duty; (3) an injury proximately resulted from that breach; and (4) the plaintiff suffered damages. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005).

The threshold issue of whether a duty exists is determined by the court as a matter of law. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). The failure to properly perform a contractual duty may only give rise to a negligence action where a duty is breached "separate and distinct from those assumed under the contract." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004). However, "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and ... a negligent performance constitutes a tort as well as a breach of contract." *Id* at 465, citing *Clark v Dalman*,

379 Mich 251, 260-261; 150 NW2d 755 (1967). Regardless, “a tort action will not lie when based solely on the nonperformance of a contractual duty.” *Fultz, supra* at 466.

Defendant further claims that the only duty that Defendant would have to Plaintiff, if at all, falls within the parameters of a “special relationship.” According to Defendant and *Harts*, a “special relationship” exists which would change the “no-duty” rule when:

(1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.

Id at 10-11.

In the instant case, there is a question of fact as to whether or not Defendant misrepresented the nature or extent of coverage by indicating that it had utilized the U S I & C as a surety in the past and it had been acceptable to the state. Though Defendant contends that submitting a bond from U S I & C would have been sufficient with the additional Amerisure Rider, but for Plaintiff’s untruthfulness as to the total costing of the project, there remains a question of fact whether Defendant assumed “an additional duty,” either by express agreement or by promise to provide a conforming bond.

Therefore, the Court will deny Defendant’s motion with respect to the negligence claim.

3. Detrimental Reliance

Defendant’s last argument is that Plaintiff’s claimed reliance is unreasonable because Defendant’s only promise was to provide a surety bond and had not promised to provide a bond issued by a surety on the approved list.

Detrimental reliance is a facet of promissory estoppel. To prevail on a theory of promissory estoppel, Plaintiff must show: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 548-49; 619 NW2d 66, 71 (2000); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993).

To support a claim of estoppel, a promise must be definite and clear. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in believing that a commitment had been made. *Id.* Plaintiff fails to show that the promise to provide an approved surety bond was “definite and clear.” *Id.* Moreover, Defendant has demonstrated that Plaintiff knew in advance that the surety was not on the approved list. Thus, Plaintiff’s reliance was not reasonable even in light of Defendant’s assurances that the surety had been acceptable on past projects.

Therefore, the Court will grant summary disposition with respect to Plaintiff’s detrimental reliance claim.

IV. CONCLUSION

As a matter of law, the Court will grant summary disposition with respect to the breach of contract claim and the detrimental reliance claim. However, because there is a genuine issue of

fact as to the existence of a special relationship between Defendant and Plaintiff, the Court will deny Defendant's motion for summary disposition as to Plaintiff's negligence claim.

DATED: 6/3/2015

/s/ Daniel P. Ryan

Circuit Judge